

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD J. HENNESSEY)	DOCKET NUMBER
)	SF07528510126
)	
v.)	
)	
U.S. POSTAL SERVICE)	Date: JUN 19 1985
)	

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

OPINION AND ORDER

Appellant was removed effective November 7, 1984, based on charges that, following his reassignment to the position of part-time flexible Clerk on September 15, 1984, he failed to follow instructions for requesting leave, and was continuously absent without leave (AWOL).^{1/} In an initial decision dated January 25, 1985, a presiding official of

^{1/} The parties stipulated that appellant was scheduled to report for duty as a Clerk on September 15, 1984, that he refused to do so, and that he never did perform the duties of Clerk.

the Board's Denver Regional Office found the charges supported by a preponderance of the evidence, and sustained the action. Appellant filed a timely petition for review alleging that his reassignment was unlawful; that the agency failed to follow applicable regulations; and that the penalty of removal was unreasonable.

Appellant was reassigned to a Clerk position from a Carrier position based on medical problems with his ankles (Ag. Ex. A, B, C). The reassignment was at the same level with approximately the same duty hours. Appellant argued to the agency, as he did unsuccessfully before the presiding official, and as he does now, that he is able to perform his Carrier duties and that his reassignment constituted an unlawful order. However, the Board has no jurisdiction to review an employee's reassignment without loss of pay or grade. Lopez v. Department of Housing and Urban Development, 5 MSPB 128 (1981). Thus the merits of the agency's decision to reassign appellant are not reviewable by the Board. Appellant's obligation was to obey the agency's order while taking appropriate steps to challenge its validity. Gragg v. U.S. Air Force, 11 MSPB 546 (1982). Those steps could have included filing a grievance over the reassignment. We find no error in the presiding official's refusal to examine the merits of the reassignment.

Next appellant claims that the presiding official erred in finding that the agency followed its own regulations. The "regulations," according to appellant, are the negotiated agreement of the National Association of Letter Carriers ("CBA") and the Employee and Labor Relations Manual ("ELR Manual"). The presiding official reviewed the cited portions

of both documents^{2/} (App. Ex. 1 and 2) and found that there was no violation of Article 13 of the CBA and that the provisions of the ELR Manual were not applicable to appellant's situation. Appellant has failed to allege specific error with respect to the presiding official's consideration of these provisions. In the absence of a specific challenge, we find no basis for reviewing the presiding official's findings with regard to the CBA or the ELR Manual.

Lastly, appellant contends that removal is too severe a penalty. The Board will modify an agency-imposed penalty only when it finds that the agency's judgment clearly exceeded the limits of reasonableness. Payne v. Department of the Army, 6 MSPB 581 (1981); Douglas v. Veterans Administration, 5 MSPB 313 (1981). The relevant factors in considering the appropriateness of a penalty have been set out in Douglas, supra. Those relevant to the case at hand include the following:

- (1) The nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities;
- (2) The employee's past disciplinary record; and
- (3) The employee's past work record, including length of service.

^{2/} Article 13, Section 2B of the CBA provides that an injured employee who has 5 years with the Postal Service can request permanent reassignment to light duty or other assignment. The presiding official found that the agency had placed appellant in a limited duty position which conformed with his medical restrictions, and that there was, therefore, no violation.

Sections 546.141 and 546.15 of the ELR Manual concern the agency's obligation to reemploy individuals who have fully or partially overcome compensable disabilities. The presiding official found these sections inapplicable since the record does not reflect that the Office of Workers Compensation has determined that appellant's injury is compensable.

Here the offense of failing to follow instructions relating to leave, and unauthorized absence, are indeed serious and basic to the employer-employee relationship. Particularly in an agency such as the Postal Service, intentional and continuous absence from the workplace constitutes a serious impediment to the agency's mission. See Rubin v. United States, 150 Ct. Cl. 28 (1960). Weighing in appellant's favor is a relatively unblemished work record^{3/} spanning seventeen years. Nevertheless, considering that the sustained charges include a two-month period of intentional AWOL, continuing through the notice period, we find that appellant's removal was appropriate, and that managerial judgment was properly exercised within tolerable limits of reasonableness. Douglas, supra, at 329.

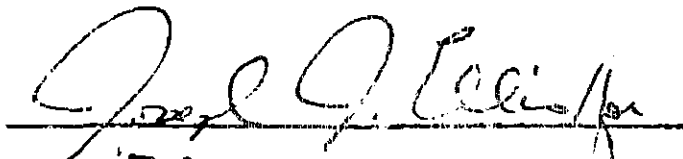
Accordingly, the petition for review is hereby DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board

^{3/} The proposal notice cited, as appellant's past record, a February 17, 1983 Letter of Warning for failing to work in a safe manner.